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June 13, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station, 2nd Floor
Boston, MA 02110

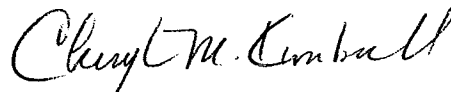
Re: NSTAR Gas Company, D.T.E. 05-36

Dear Ms. Cottrell:

On behalf of NSTAR Gas Company, please find attached its Response to the Petition of Heath Carey and Tara Carey for Leave to Intervene in the above-referenced proceeding. Please contact me if you have any questions regarding the document.

Thank you for your attention to this matter.

Very truly yours,



Cheryl M. Kimball

Enclosure

cc: Shaela McNulty Collins, Hearing Officer (2)
Denise Desautels, Counsel (2)
Alan L. Cantor, Esq.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

NSTAR Gas Company)
_____))
_____)

D.T.E. 05-36

**NSTAR GAS COMPANY RESPONSE TO PETITION OF HEATH CAREY AND
TARA CAREY FOR LEAVE TO INTERVENE**

I. INTRODUCTION

On December 10, 2003, NSTAR Gas Company ("NSTAR Gas" or the "Company") submitted its response to the Notice of Probable Violation (the "NOPV") issued to the Company on November 7, 2003, by the Pipeline Safety and Engineering Division (the "Division") of the Department of Telecommunications and Energy (the "Department"). On May 11, 2005, the Department issued a Notice of Procedural Conference (the "Notice") commencing an adjudicatory proceeding in the matter of the NOPV, which is docketed as D.T.E. 05-36. In the Notice, the Department stated that the scope of this proceeding is "limited to allegations of non-compliance with the federal pipeline safety regulations as stated in the NOPV." Notice at 1.

On June 8, 2005, Heath and Tara Carey (the "Petitioners") submitted a petition to intervene (the "Carey Petition") in the above-referenced docket. As stated in the Petition, the Petitioners are plaintiffs in an ongoing civil suit in Middlesex Superior Court against NSTAR Gas and others in connection with a natural gas incident that occurred on July 24, 2002, at 65 Main Street in Hopkinton, Massachusetts. Carey Petition at 1. The civil proceeding is currently scheduled for trial in Middlesex Superior Court in January 2006.

Notwithstanding the ongoing nature of the separate civil proceeding, the Petitioners seek to intervene in the Department's adjudication of the NOPV arguing that: (1) the Petitioners are "substantially and specifically affected" by this proceeding because "the results of the proceeding could have a material effect on the nature of the evidence which Petitioners may introduce at their civil trial;" and (2) the Petitioners have certain "evidence" that they contend is "relevant to the issues in this hearing." Carey Petition at 2, 3. Although NSTAR Gas understands the Petitioners desire to keep abreast of the outcome of the proceeding, the Department should deny the Carey Petition because: (1) the Petitioners have not demonstrated that they will be "substantially and specifically" affected by the outcome of the Department's adjudication, and (2) the issues and evidence of interest to the Petitioners are outside the stated scope of the Department's proceeding. Accordingly, for the reasons set forth below, the Department should deny the Carey Petition.

II. STANDARD OF REVIEW

Under Massachusetts law governing adjudicatory proceedings, the Department "may allow any person showing that he may be substantially and specifically affected by the proceeding to intervene as a party in the whole or any portion of the proceeding, and allow any other interested person to participate by presentation of argument orally or in writing, or for any other limited purpose," as the Department may order. G.L. c. 30A, § 10(4).

In accordance with G.L. c. 30A, § 10(4), the Department's regulations require persons requesting leave to intervene in a Department proceeding to demonstrate how they would be substantially and specifically affected by the proceeding. 220 C.M.R.

§ 1.03(1)(b); Boston Edison Company/Commonwealth Electric Company, D.T.E. 98-118/98-119/126, at 8 (1999); Boston Gas Company, D.T.E. 00-24, at 2 (2000). Under G.L. c. 30A, § 10(4), the Department has broad discretion to grant or deny a petition to intervene as a party. Tofias v. Energy Facilities Siting Board, 435 Mass. 340, 346 (2001); Cablevision Sys. Corp. v. Department of Telecommunications & Energy, 428 Mass. 436, 439 (1998); Attorney General v. Department of Pub. Utils., 390 Mass. 208, 216 (1983) (denial of intervention within Department's "broad discretion"). In addition, G.L. c. 30A, § 10(4) provides the Department with broad discretion to grant a person leave to intervene "as a party" in the whole or in any portion of the proceeding, or to allow persons not substantially and specifically affected (and therefore not qualifying as a "party") to participate in the proceedings for limited purposes. G.L. c. 30A, § 10; 220 C.M.R. § 1.03(1)(e); Tofias v. Energy Facilities Siting Board, 435 Mass. at 346-47.

Under 220 C.M.R. § 1.03(2), a "party" is defined as (a) a specifically named person whose legal rights, duties or privileges are being determined in an adjudicatory proceeding before the Department, (b) any other person who as a matter of constitutional right or by any provision of the Massachusetts General Laws is entitled to participate fully in such proceeding and who enters an appearance; and (c) any other person allowed by the Department to intervene as a party. Thus, if the Department renders a ruling denying intervention and it is appealed to the Supreme Judicial Court, the appellant must be able to demonstrate that (1) as a matter of law [it] was entitled to intervene and was improperly denied that right, or (2) that [it] is a person who as a matter of constitutional or statutory law was entitled to participate fully in the proceedings." Tofias v. Energy

Facilities Siting Board, 435 Mass. 340, 346, citing Save the Bay, Inc. v. Department of Pub. Utils., 366 Mass. 667, 673 (1975).

When ruling on a petition to intervene or participate, the Department may consider, among other factors:

The interests of the petitioner, whether the petitioner's interests are unique and cannot be raised by any other petitioner, the scope of the proceeding, the potential effect of the petitioner's intervention on the proceeding, and the nature of the petitioner's evidence, including whether such evidence will help to elucidate the issues of the proceeding, and may limit intervention and participation accordingly.

Boston Edison Company, D.P.U. 96-23, at 10 (1998) (citations omitted). The petitioner must also demonstrate that its interests are not otherwise adequately represented by the Attorney General or another party in order to obtain full-party status. Boston Edison Company, D.P.U. 97-63, at 16 (1997); Boston Edison Company/Commonwealth Electric Company, D.T.E. 98-118/98-119/126, at 15.

III. ARGUMENT

A. The Petitioners Are Not Substantially and Specifically Affected by This Proceeding.

The Petitioners put forth a single argument to support their claim that they are "substantially and specifically affected" by the Department's proceeding, which is that "the results of this proceeding could have a material effect on the nature of the evidence which Petitioners may introduce at their civil trial." Carey Petition at 2. This single, conclusory claim is wholly insufficient to support a finding by the Department that the Petitioners would be "substantially and specifically affected" by this proceeding. Moreover, none of the factors traditionally considered by the Department in evaluating a

request for leave to intervene weigh in favor of the Petitioners. Therefore, for the following reasons, the Department must deny the Petitioners' request to intervene.

The Petitioners claim that they have an interest in the Department's adjudication because "the results of this proceeding could have *a material effect on the nature of the evidence* which Petitioners may introduce at their civil trial." However, this claim fails to provide any nexus between the subject matter of the Department's adjudication (*i.e.*, compliance or non-compliance with specified regulations) and a "substantial and specific" affect on the petitioners. Carey Petition at 2 (emphasis added); Tofias v. Energy Facilities Siting Board, 435 Mass. 340, 346 (2001). Instead, the Petitioners' claim is that the outcome of the proceeding may affect *the evidence* that may be introduced in another legal proceeding.

Notably, the purpose of this proceeding is not to provide evidence for use in the civil proceeding and the desire to use (*potentially*) the outcome of this proceeding as "evidence" does not create a "substantial and specific effect" on the Petitioners in terms of the Department's adjudication. Under Department precedent, a "substantial and specific effect" occurs where the outcome of the proceeding has a direct impact on the legal rights, duties or privileges of a specifically named person. See, e.g., Boston Gas Company, D.T.E. 00-24, at 3-4. A "substantial and specific effect" does not occur where the outcome of the proceeding has only the indirect effect of providing potentially admissible evidence in another legal proceeding, and the legal rights, duties and obligations of the Petitioners *remain unchanged* by the outcome of the Department's proceeding.

By way of support for their claim, the Petitioners offer only two vague statements to the effect that: (1) “if NSTAR in fact violated these regulations, such violation would be evidence of negligence under Massachusetts law;” and (2) the Petitioners have sustained losses “which they contend resulted from the failure of NSTAR to comply with applicable regulations.” Carey Petition at 2. Neither of these statements provides a sufficient indication as to the linkage between a finding of compliance or non-compliance *with the regulations at issue* and a substantial and specific affect on the Petitioners. In fact, the Petitioners go on at length regarding the alleged actions of the Company in relation to the incident and none of these allegations is based on non-compliance with the regulations at issue in this proceeding. All of the allegations relate to various and sundry arguments regarding practices and procedures not referenced in the NOPV, and therefore, outside the scope of this proceeding. The Petitioners simply do not provide an adequate explanation as to the manner in which the Department’s findings in the proceeding will have a substantial or specific effect on their legal rights, duties or obligations, which is required by G.L. c. 30A, § 10(4).

Second, the Petitioners’ claim that “the results of this proceeding *could* have a material effect on the nature of the evidence which Petitioners *may* introduce at their civil trial” demonstrates the speculative nature of the Petitioners’ “interest” in the Department’s adjudication. In fact, the Petitioners do not allege any impact from this proceeding beyond the possibility that the results of the adjudication may be offered as evidence by the Petitioners in the civil proceeding. In that regard, any materials or testimony provided in the Department’s adjudication will become part of the public record and will be freely available to the Petitioners *regardless of their participation in*

this case. Moreover, the Supreme Judicial Court has found that injuries that are speculative, remote and indirect are insufficient to confer standing. Ginther v. Commissioner of Ins., 427 Mass. 319, 323 (1998); see also, Tsagronis v. Board of Appeals of Wareham, 415 Mass. 329, 335 (1993); Boston Edison Co. v. Boston Redevelopment Auth., 374 Mass. 37, 46 (1977).

Because of the lack of nexus between compliance with the regulations at issue in this proceeding and the Petitioners' claims in the civil proceeding, the outcome of the Department's proceeding *will have no effect* on the claims made by the Petitioners in the civil proceeding. Nor do the Petitioners allege any such affect. The Petitioners state only that the results of this proceeding "could have a material effect on the *nature of the evidence* which Petitioners *may* introduce at their civil trial." Carey Petition at 2 (emphasis added). The potential admissibility of evidence in the civil proceeding is not a proper basis for the Department to conclude that the Petitioners are substantially and specifically affected by this proceeding because the admissibility of evidence in the civil proceeding is unaffected by the Petitioners' participation in this proceeding. There is no legal nexus between the Petitioners' intervenor status in this case and the potential admissibility of the record evidence in the civil proceeding. Accordingly, the potential admissibility of evidence in the civil proceeding does not support or justify the Petitioners' claim that they are substantially and specifically affected by the outcome in proceeding.

In this case, liability for the Petitioners' damages is being litigated in Superior Court. However, the claims made by the Petitioners in the civil proceeding are not relevant to this proceeding and, in fact, the Petitioners' use of this proceeding to further

their interests in the civil litigation would be an misuse of the Department's adjudication, which is aimed at determining the Company's compliance with the specified regulations and not at making a determination as to the issues involved in the civil litigation. The adjudication of the Company's compliance with the regulations at issue is an independent determination to be made by the Department that will not, in any manner, establish liability for the incident occurring on July 24, 2002.

Lastly, under 220 CMR 1.03(1)(b), a petitioner seeking to intervene as a party must "state the contention of the petitioner, *the relief sought and the statutory or other authority therefor . . .*" (emphasis added). Here, the Petitioners fail to state any relief other than the "granting of the Petition to Intervene," nor do the Petitioners cite to any statutory or other legal authority providing them an interest in participating as a full "party." See, Carey Petition at 2. If the Petitioners' were "substantially and specifically affected" by the proceeding, i.e., if they had an interest that was being adjudicated by the Department, the relief sought by the Petitioners would relate to the substantive issues at stake in the case. Here, the Petitioner make no such claim, nor could they because the issue at stake is whether the Company complied with certain specified regulations and a determination of *non-compliance* has no direct impact on the legal rights, duties and obligations of the Petitioners. The failure to state a claim for relief beyond the granting of the Petition is a clear indication that the Petitioners will not be affected in any way by the outcome of the Department's proceeding.

B. The Evidence Petitioners Assert They Will Present Is Not Relevant to the Department's Alleged Violations.

Under 220 CMR 1.03(1)(b), the intervenor's petition must also state the "nature of the evidence the petitioner will present if the petition is granted." The Petitioners

maintain that in the course of discovery in the civil proceeding, they have adduced evidence relevant to the issues in this proceeding. Carey Petition at 3-4. However, the description of the evidence to be offered by the Petitioners indicates that rather than addressing the alleged violations specifically at issue in this case, the evidence would relate to a host of claims and actions not within the scope of this proceeding as established by the Department. Id. at 3. Instead of “assisting” the Department, the Petitioners seek to blur the lines between the Department’s investigation and the separate litigation that is occurring in Middlesex County Superior Court on issues relating to liability. The Department should reject this obvious attempt to derail the stated scope of its proceeding in this case.

C. The Department Should Not Permit the Petitioners to Litigate the Civil Suit in This Proceeding.

It is well established under Department precedent that public policy weighs against the granting of a petitioner’s request to intervene in a Department investigation where the petitioner is already pursuing similar claims in a separate court proceeding.

Western Massachusetts Electric Company, D.T.E. 01-36/02-20, at 10-11 (2003).

[The Petitioner]’s pursuit of similar claims in various jurisdictions raises the appearance of forum-shopping, however, and gives the impression that [Petitioner]’s efforts to obtain party status in this proceeding *may be an attempt to relitigate those issues already addressed or under consideration in other venues*. The Department has a responsibility to avoid creating the potential for conflicting rulings.

Id. (emphasis added). As the Department has repeatedly stated, public policy favors this approach because the issue of liability is properly addressed in a formal legal setting governed by Massachusetts rules of civil procedure, where evidence not applicable to this regulatory proceeding can be properly offered. To allow the Petitioners to intervene in this separate investigation will inevitably blur the line between the two proceedings and

will create the unwanted potential for conflicting rulings, as well as undue administrative complexity. Moreover, among the various considerations the Department evaluates in ruling on petitions to intervene is whether the evidence a petitioner seeks to present will help elucidate the issues in the proceeding. Boston Edison Company, D.P.U. 96-23, at 10. To the extent that the Petitioners intend to present collateral evidence, not within the proper scope of this proceeding so as to advance their separate claims in Superior Court, it will greatly complicate the resolution of the case. It is well established that, where a party's participation in a case would not contribute to the orderly conduct of an agency's proceedings, that party should not be accorded full-party status. City of Newton vs. Department of Public Utilities, 339 Mass. 535, at 543 (1959); Eastern Edison Company, D.P.U. 96-24, at 5-6 (1997). Such a result is clearly not in the public interest and should be denied by the Department in this case.

Although not meeting the Department's standard for intervention, NSTAR Gas understands the Petitioners' desire to stay apprised of the Department's adjudication. NSTAR Gas is committed to working with the Petitioners' through their attorney to accomplish this objective.

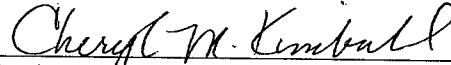
IV. CONCLUSION

For the foregoing reasons, NSTAR Gas requests that the Department deny the Petition to Intervene.

Respectfully submitted,

NSTAR Gas Company

By its attorneys,

A handwritten signature in cursive script, reading "Cheryl M. Kimball". The signature is written in dark ink and is positioned above a horizontal line.

Robert J. Keegan, Esq.

Cheryl M. Kimball, Esq.

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Dated: June 13, 2005